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ABSTRACT

The paper reviews judicial rulings regarding labeling, due process in placement, and right to education for handicapped students with emphasis on the hearing impaired. Statutes and regulations guaranteeing rights to the handicapped are discussed. The issues surrounding the individualized education program and the least restrictive environment principle are noted. Unanswered questions produced by P.L. 94-142, the Education for All Handicapped Children Act, and the Rehabilitation Act of 1973 are pointed out, including questions of hearing officers and the concept of reasonable accommodation. (CL)

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THE RIGHTS OF PARENTS AND THE RIGHTS OF CHILDREN: A REVIEW OF THE LEGISLATIVE AND JUDICAL ISSUES SURROUNDING MAINSTREAMING

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THE RIGHTS OF PARENTS AND THE RIGHTS OF CHILDREN:
A REVIEW OF THE LEGISLATIVE AND JUDICIAL ISSUES SURROUNDING MAINSTREAMING

INTRODUCTION

Until a few years ago, the discussion of children in our society has been both too broad and too narrow. In 1957, the United Nations ratified a declaration of the rights of the child, and in 1970 the White House Conference endorsed the Children's Bill of Rights. Although each proclaimed a set of rights to which all children were entitled, neither could effectively prod the institutions of our society to comply in everyday practice. It remained for the general civil rights movement in the mid-60's and the specific civil rights legislation for the handicapped in the mid-70's to translate these sentiments into blueprints for action and models for compliance. Thus, this paper will examine some of the larger social and constitutional issues that have been brought to bear on the legislative enactment of such rights for handicapped children and youth, and also demonstrate how these rights affect parents, the schools, and the marketplace. In order to achieve this end, it is appropriate to review how the sovereign principle of due process, the doctrine of the least restrictive alternative, the concept of reasonable accommodation, and the applicability of the equal protection clauses of the Fifth and Fourteenth Amendments all are embodied within a variety of statutes, regulations, and court rulings as a set of legally enforceable rights for children and parents.

Paper presented at the Elwyn-Nevil Symposium on Sensory Deficits, Philadelphia, Pennsylvania, November 13, 1978.

Implicit in every statement of children's rights is the belief that even if all adult rights were granted to children and were scrupulously enforced, there still would be no guarantee that all the critical needs of children would be met. The terms "needs" and "rights" mean very different things and consequently have very different policy implications. A "need" identifies a state of dependence without, however, identifying whose responsibility it is to correct it. A "right," on the other hand, is a protection afforded to all persons by the Constitution. It is a legally enforceable claim to the possession of property, authority, or the enjoyment of privileges and opportunities. Until recently, children were not even thought of as being equal under the law. Consequently, their rights were unsecured until the institutions of our society began to recognize them and to assume a statutory responsibility for enforcing these rights.

Prior to this decade, the rights of parents and children had only very gradually been clearly and comprehensively articulated. In 1924, the Supreme Court established a precedent ruling (Pierce v. Society of Sisters) decreeing that parents had the right to direct their children's education. Since that time, whenever state schooling laws came before the courts, a consistent record of rulings has emerged which has reinforced the parental right of supervision over a child's education. An even more significant precedent occurred in the body of case law on educational rights of children in the 1954 Brown v. Board of Education decision. This decision emphasized the critical importance of education to both the child and to the commonweal. The Court went to great lengths to emphasize that no one could be expected to succeed in life if denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available and equally accessible to all children. The protective

procedures of the Bill of Rights and the equal protection clauses of the Fifth and Fourteenth Amendments guarantee that all people similarly situated shall be treated alike by the state. It is precisely under this analysis of equal protection that the state bears the burden of justifying any labeling or classification of children.

The courts have long recognized the major problems associated with the practice of labeling: (1) the danger of the child becoming victimized by the stigma associated with the label; (2) the danger of the child's behavior conforming to the stereotyped expectations of the label; and (3) the tragedy of an incorrectly applied label. Despite these perils, categorizing has been found necessary to open doors to opportunities, to get help for a child, to get legislation written, to get funds appropriated, and to get programs designed to serve the problems of exceptional children. The act of classifying children and handicaps is an inescapable fact of life that can be put to productive and beneficial use only if appropriate safeguards are established. Therefore, it is through the sovereign principle of *due process* that we find such a safeguard. This safeguard can both reduce any unnecessary labeling and contribute to the delivery of specialized services required by children with special learning needs.

The clear responsibility of American educators to adhere to due process requirements has only emerged during the present decade. In the past, decisions exempting a child from school, placing a child in a special class, or otherwise changing a child's educational placement were often made without regard to a basic fairness of procedure either to the child or to the parent. Fairness of procedure is what due process is all about. The exact boundaries of this sovereign principle, as it derives from both the Bill of Rights and

the Constitution, are undefinable and vary according to contextual circumstances. As Justice Felix Frankfurter wrote: "The principle of due process cannot be imprisoned within the treacherous limits of any formula or mechanical yardstick; instead, it is a delicate process of adjustment, inescapably involving the exercise of judgement, fairness and openness."

With the enactment of the Educational Amendments of 1974, P.L. 93-380 mandated that in order for states to remain eligible for federal assistance in special education, the state education agency must develop a procedural plan to safeguard the rights of handicapped children. Such a plan must show that due process would be evident in any matter relating to the school's decision to identify, evaluate, or place a handicapped child. Such a procedure makes the school's decision-making machinery at least appear more equitable, if only because the basis for the decision is shared. Such a procedure tends to minimize the possibility of abuse and increases the likelihood of an educationally sound decision, since the school is forced to examine regularly both the premises and the conclusion of a child's classification and placement.

In 1972, two landmark decisions gave unquestioned support to the principle of due process as it derives from the equal protection clauses of the Constitution and as it applies to a child's right to an education. Both cases -- The Pennsylvania Association of Retarded Children v. the Commonwealth of Pennsylvania and Mills v. the Board of Education -- based their rulings on the fact that parents had been denied the opportunity for a due process hearing regarding the placement and classification of their children by the schools. It was the Court's opinion that the due process clause of the Fourteenth Amendment, limiting police powers of the state,

was elastic enough to embrace the Fifth Amendment, limiting police powers of the Congress, so that the children themselves were in effect being denied their own rights of equality of educational opportunity: "No person shall be deprived of life, liberty or property without due process of law." Thus, as applied to education, due process guarantees that everyone shall have life, liberty, property, and immunities protected.

It must be stressed that neither the Constitution nor the Supreme Court has ever defined with precision the words "due process of law." Instead, the interpretation is that while due process requires no particular form of procedure, it does entail some basic and fundamental principles:

* the right to a notice,
* the right to a hearing,
* the right to counsel,
* the right to raise issues,
* the right to fairness and impartiality,
* the right to introduce evidence.

With the passage of P.L. 94-142, Congress declared that it is in the national interest for the federal government to assist the states in providing programs to meet the educational needs of handicapped children in order to ensure them equal protection under the law. This legislation, with its strict adherence to the provisions of due process, has forced the schools to adopt a totally new and open approach to information-sharing regarding the education of handicapped children. Since the schools can no longer be secretive in dealing with handicapped children and their parents, they must become totally open in explaining to the community what can and cannot be done and the reasons why. The relationship of P.L. 94-142 to the due process clause of the Fourteenth Amendment also assists the schools to meet the

educational needs of children when there is parental resistance to the acceptance of the severity of a child's handicap.

In the final analysis, educators must become aware that adherence to due process procedures will in no way reduce their professional responsibility or authority. Due process will thus come to be viewed as providing educators with that leverage which must be their goal -- to act openly and in the best interest of the children they serve.

THE STATUTES AND THE REGULATIONS

The exercise of a person's Constitutional rights has been strongly reinforced by the enactment in 1975 of the Education for All Handicapped Children Act (P.L. 94-142). This piece of civil rights legislation for handicapped children and their parents guarantees:

* the right to an education;
* the right to a free education;
* the right to an appropriate education;
* the right to due process of law;
* the right to confidentiality, as amplified by the Family Education Rights to Privacy Act;
* the right to testing which does not discriminate on the basis of race, culture, language, or method or communication.

This legislation, along with the Rehabilitation Act of 1973 and its renewed version known as the Comprehensive Rehabilitation Services Amendment of 1978 — which expands funding for programs to prepare handicapped citizens for employment -- reflects a significant change in America's social values and expression of concern for all citizens. As a public policy, Title V, Section 504 of the Rehabilitation Act ends discrimination on the basis of handicap. Also, a comparable protection guaranteeing the rights of our nation's handicapped school children is found in its companion piece of legislation, P.L. 94-142. Both laws mandate that handicapped citizens be brought into the mainstream of American society. The impact that these laws will have in shaping the future of the nation's schools and marketplace is not, at present, clear. What is known is that (1) an evolutionary process of development of regulations, interpretations, and court rulings

will be made over the next decade to determine the ultimate impact of these laws, and (2) a new era has begun for all children ... not just those with handicaps ... because the laws force recognition of a number of sound educational principles that have heretofore been neglected. What is essential to the success of these laws is the formulation of policy positions by the schools that will chart alternatives for future decision-making crises. It will be helpful to look at various provisions required by these laws in order to identify future directions.

An area within P.L. 94-142 needing such policy guidance is the procedural requirement of developing an individual educational plan (IEP) for each handicapped child. The schools increasingly are being faced with such decisions as: (1) How they should gather and then assess the input that goes into the construction of an IEP; (2) How they should determine the functional characteristics of an IEP -- what it is and what it is supposed to achieve; (3) How they should increase parental awareness of the instructional aspects of an IEP and thereby secure their active involvement. Unless policy positions are formulated to guide the schools in such decision-making areas, the effectiveness of the IEP as a planning tool will be seriously challenged.

Exceptional care should be taken to point out that the value of an IEP is in its being used as a management tool for planning, programming, and evaluation of special education and related services, not merely as a compliance document needed for receiving funds. Thus, when it is seen as a management tool, the IEP process will require more formal procedures for planning, programming, and evaluating. It also will require more active participation by professionals, parents, and, to the maximum extent possible, the child.

The IEP is the central activity surrounding the assessment and placement process. The purpose of assessment is to identify and describe a child's strengths, weaknesses, and needs in order to determine his or her eligibility for placement. The purpose of placement, however, is to determine the appropriate educational setting for each child within which his or her educational needs can best be met under the least restrictive conditions. It is precisely in this area of least restrictiveness that there emerges one of the more polemical issues of P.L. 94-142.

This portion of the Education for All Handicapped Act derives from the doctrine of the *least restrictive alternative*. This doctrine finds similar expression in such terms as: (a) the less drastic means, (b) the reasonable option, (c) the precision of regulation, and (d) the matter of necessity. Like the principle of due process, the doctrine of the least restrictive alternative has a long history in American jurisprudence since both are concerned with facilitating the regulation of legislative and administrative enactments. This doctrine provides the judicial foundation to any administrative decision-making of the schools involving educational placement. Specifically, no placement shall proceed without appropriate examination of alternative actions.

The regulations governing the Handicapped Act mandate that (1) each educational agency must ensure that a continuum of alternative placements be made available to meet the needs of children requiring special education or related services; (2) this continuum must include instructional services in regular classes, special classes, and special schools; (3) each child's placement in any of these options, based on the IEP, must be redetermined annually; and (4) unless the IEP requires some other arrangement,

the child is to be educated in the school which he or she would ordinarily attend if not handicapped.

Significantly, the Bureau of the Education for the Handicapped concurred with the concerns expressed by the House Education and Labor Committee in a June, 1975, House Report to the Congress. That report stated:

> The Committee understands the importance of providing educational services to each handicapped child according to his or her individual needs. These needs may mean that instruction is to be given in varying environments. The Committee urges that, where possible and where most beneficial to the child, special education services be provided in a classroom situation. An optimal situation would obviously be the placement of the child in the regular classroom. However, the Committee recognizes that this is not always the most beneficial option.

Extreme care must be taken to ensure that, in our attempts to do what is best for the child, we do not end up doing the right things for the wrong reasons, thereby losing the child in the process. Haphazard use of our language has caused the term *mainstreaming* to become a shorthand version of the least restrictive placement option. Such interchangeability of terms has contributed to the impression that the law intends a sweeping elimination of special education classrooms and special schools. This state of affairs presents us with a classic instance of slipping on one's premise only to come sprawling to an unwarranted conclusion. No such action was ever intended by this law. It did intend that there be a clearly established set of due process procedures that mandate that the schools consider all reasonable programming alternatives so that a placement which is least restrictive for the particular child can be selected and implemented. It is further intended that never again would special schools or classrooms be turned into educational dead ends for students.

It is apparent then that the law never intended that children be

mainstreamed as a matter of unexamined fact. Instead, the intention was that each child be given equality of educational opportunity for a placement most suitable and most appropriate for his or her assessed and recognized needs. Admittedly, while the term mainstreaming does do some subtle damage to the law's precise meaning of a least restrictive environment, it nonetheless will continue in our vocabulary as a term of convenience. The term mainstream will continue to carry the implications of decatorization, declassification, and desegregation. However noble these intentions may be, we may very soon witness a backlash of parental disillusion, professional frustration and resentment on the part of the regular classroom teacher, and ultimately, the tragedy of mismanaged opportunity in the life and development of an individual child. Let us not permit ourselves to entertain the notion that a profoundly deaf child can ever become a fictitious version of a hearing child simply by providing the deaf child with a regular classroom environment.

In summary, the intent of a least restrictive education is to remove any unnecessary societal limitations placed on a child in order to ensure that the child receives an education fully commensurate with his or her needs. Thus, the least restrictive environment will always be based on, and be relative to, the individual child's assessed needs by guaranteeing a child equal access to an appropriate education. The implication is that any restrictions that flow from such placement would necessarily originate from the child's needs and not from some arbitrary denial of right of access to the regular educational environment. The doctrine of the least restrictive alternative will continue to undergo further refinement and definition as a body of case law develops and as the schools develop further their abilities to assess needs and effect placement.

Many questions of a practical nature will remain unanswered until a body of case law develops. Some of these questions are: (1) Who bears the ultimate legal responsibility for the child? (2) If a child does not reach a certain level of success as defined by his or her parents and the IEP, are the schools to blame? (3) Can the parents or schools be sued for improper educational practice? (4) Are the parents too emotionally involved with their children to be objective about educational placement and potential achievement? and (5) Are educators too emotionally involved in their own budgets or self-interests to recommend an educational placement contrary to their own philosophies?

Other areas of the law turn up still further difficulties that must be addressed in the future. First, the legislation stipulates that states receiving federal financial assistance must include all handicapped children from ages 3 to 21 in their educational programs by 1980. However, if local practice or court orders exempt the 3-5 and 18-21 year old age groups, this mandate of the federal law would not be binding. In practice, there are very few states which currently mandate education for these two age groups, and still fewer that mandate education from birth. In order to correct this imbalance, and to capitalize on the deaf child's critical language-development years of infancy and early childhood, the current law will have to be amended before equal accessibility for children of all ages can be realized.

Second, P.L. 94-142 specifies that parents may request a due process hearing concerning the placement of their child from an impartial hearing officer who must not be an employee of the state or local education agency. At variance with this intent are several state regulations that require such an officer be a member of the state education agency. Similar

instances of variance occur concerning the issue of parental involvement. While the law encourages parental participation in the development of a child's educational plan, some states require only that the IEP be signed by the parents before implementation. In order to prevent an erosion of the precious parental rights, responsibilities, and authority declared by the law, further legislation and regulatory clarifications will be necessary.

Concerning comparable areas and concerns within the Rehabilitation Act requiring future resolution by schools and courts, we will limit our discussion to the single most critical concept underlining the intent of Section 504 -- the issue of what constitutes a *reasonable accommodation*. The law stipulates that a reasonable accommodation must allow for the known limitations of qualified handicapped applicants for programs or employment. The law does not, however, mandate that such an accommodation be provided if there is evidence that it would impose an undue hardship on the program's operation. The intent of the reasonable accommodation clause appears to emphasize program accessibility and employment restructuring. However, because there is so much room open for interpretation, future policies will be needed to assist with such determinations as (1) defining the parameters that constitute a reasonable accommodation; (2) addressing the issue of who defines reasonableness, and for what social, educational, or political purposes; and (3) assessing the impact of various options for program modifications so that unnecessary disruptions in the delivery of services are avoided.

The mandate to our nation's schools is clear, not only in terms of these pieces of legislation, but also in terms of future-oriented policy formulations to meet the needs that future decisions will require. The present

general language of the laws, their regulations, and their scant legislative history will provide little guidance on the resolution of such complex issues. Such generality of language can be turned to both our advantage and disadvantage. On the one hand, it allows and encourages much flexibility and diversity in administrative decision-making. It keeps government control of education in check and allows the solution to problems to be worked out gradually. On the other hand, many schools have already begun fearing the consequences of judicial decisions based on post hoc determinations of legal compliance with the regulations. These fears of risk-taking will emphasize the tendency to adhere to the semantics of specific legal requirements. What this indicates is that paper, rather than real, changes will be the option selected by the schools' decision-makers.

Future needs will also be evident over the next few years in evaluating the empirical effects of such legislation in the schools. Researchers have, generally, developed a head-in-the-sand type of behavior when asked about the current movement in mainstreaming. They are quick to point to the studies of the past that produced mounds of inconclusive evidence about the issue of special class versus regular class placement. Immense problems of methodology plagued the older studies, perhaps because they were trying to deal with the wrong set of variables. The variables that these laws force us to examine today are primarily administrative and child-oriented. They bring into focus many questions: What happens in terms of time, cost, and managerial effectiveness when a handicapped child is integrated into the regular program? What happens to the child's achievement, attitudes, and degree of acceptance by both peers and self in the mainstream classroom? Until we develop an empirically-based response to these questions, we will

have no grounds upon which to postulate future policy decisions related to this area. If we do not achieve this kind of response, then the tyranny of the three L's -- leverage, laws, and litigation -- will push the demands for quality programming beyond the ability and resources of both the schools and the special education community.

SUMMARY

We must be quick to recognize that while some solutions may be found through legislation, the individual needs of deaf children and adults will still continue to be largely unmet. Legislation only grants the opportunity. It is up to the individual to recognize and to take advantage of that opportunity. The role that schools must play in assisting with this recognition is clearly evident. They must begin moving forward with a better sense of alternatives and directions. They must continue to remind society of the problems and unmet needs of deafness, or the seeds of our future discontent will be sown in frustration. In order to accomplish this, the schools must abandon the trend of the past where growth was not so much by design as by the compulsions of circumstance. It remains, however, for the leaders to whom these schools are entrusted to be forever alert to the retardants of growth. Outside the school, the retardant is the error of escalating expectations; within the school, it is the failure to recognize that not all change is growth and not all movement is forward.

As we draw to a close, let us keep in mind the immensity of the business that remains unfinished and allow ourselves to become bothered and upset by it. Our schools for the deaf will not succeed in their mission of preparing knowledgeable, well-adjusted, and compassionate young men and women for tomorrow unless they are blessed with leaders who know in which direction tomorrow lies. Dr. Robert Frisina, a few years ago, gave a powerful turn to some words written by Thomas Wolfe that express this sentiment admirably: "If a deaf person has a talent and cannot use it, then we have failed. If a deaf person has a talent, and uses only half of it, then

we have partly failed. But if a deaf person has a talent and somehow learns to use the whole of it, then we have gloriously succeeded with a triumph and satisfaction that few people have ever known."

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